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BEFORE THE DEPARTMENT OF
NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

* * * * *

IN THE MATTER OF THE APPLICATION)	
FOR BENEFICIAL WATER USE PERMIT)	FINAL ORDER
NO. 28224-s411 GRANTED TO ROBERT)	
LOOMIS AND CLARK AND OPAL EDENFIELD)	

* * * * *

Pursuant to the March 3, 1989 Order in the Alternative that was issued in this matter, Permittee Robert Loomis was required to submit a written request for hearing, alleging an alternative operation plan, if he wished to prevent revocation of the above-specified Permit. The time period for filing the hearing request has expired. No hearing request or other documents were received.

Therefore, having given the matter full consideration, the Department of Natural Resources and Conservation hereby adopts the Findings of Fact and Conclusions of Law as contained in the March 3, 1989 Order in the Alternative, and incorporates them herein by reference.

WHEREFORE, based on the record herein, the Department makes the following:

ORDER

Beneficial Water Use Permit No. 28224-s411, issued to Robert Loomis and Clark and Opal Edenfield, hereby is revoked.

CASE # 28224

NOTICE

The Department's Final Order may be appealed in accordance with the Montana Administrative Procedure Act by filing a petition in the appropriate court within 30 days after service of the Final Order.

Dated this 18th day of April, 1989.

Peggy A. Elting
Peggy A. Elting, Hearing Examiner
Department of Natural Resources
and Conservation
1520 East 6th Avenue
Helena, Montana 59620-2301
(406) 444-6612

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing FINAL ORDER was duly served upon all parties of record at their address or addresses this 18th day of April, 1989, as follows:

Robert Loomis
P.O. Box 264
Townsend, MT 59644

T.J. Reynolds
Helena Field Office
(Inter-departmental)

James Madden
Legal Counsel
1520 E. 6th Ave.
Helena, MT 59620
(Inter-departmental)

Jim Beck
Helena Field Office
(Inter-departmental)

Sally Martinez
Sally Martinez
Secretary

June Blue

BEFORE THE DEPARTMENT OF
NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

* * * * *

IN THE MATTER OF BENEFICIAL WATER)	
USE PERMIT NO. 28224-s41I GRANTED)	ORDER IN THE ALTERNATIVE
TO ROBERT LOOMIS AND CLARK AND)	
OPAL EDENFIELD)	

* * * * *

Pursuant to the Montana Water Use Act and to the contested case provisions of the Montana Administrative Procedure Act, a hearing was held in the above-entitled matter on November 29, 1988 in Helena, Montana.

Permittee Robert Loomis appeared at the hearing in person. He is the only surviving Permittee.

The Department of Natural Resources and Conservation (hereafter, the "Department" or "DNRC") appeared by and through counsel James Madden.

James Beck, Agricultural Specialist with the Helena Water Rights Bureau Field Office, appeared as a witness for the Department.

PRELIMINARY MATTERS

The Applicant offered one exhibit for inclusion in the record in this matter: Applicants' Exhibit 1 is a letter (dated November 28, 1986) written by the Applicant, outlining his position in this matter. It was accepted for the record without objection. No other exhibits were offered for inclusion in the record in this matter.

CASE # 28224

The Department file, which includes the originals of the Application and the Objections, correspondence between the Department and the parties, Department processing documents, and the Department's previous decisions and actions in this matter, was made available for review at the hearing. No party objected to any part of the file. Therefore, the Department file in this matter is included in the record in its entirety.

The record was left open until January 31, 1989 to allow the parties a chance to review the facts for a possible stipulation or to file motions. On January 20, 1989, James Madden submitted a letter requesting that a decision be issued in this matter, but that Permittee Robert Loomis be granted additional time in which to request a hearing. Robert Loomis did not submit any response to this motion. The record closed on January 31, 1989.

The Hearing Examiner, having reviewed the record in this matter and being fully advised in the premises, does hereby make the following Findings of Fact, Conclusions of Law, and Order.

FINDINGS OF FACT

1. Robert Loomis and Clark and Opal Edenfield applied for a beneficial water use permit on April 25, 1980. Objections were received to the Application, and a contested case hearing subsequently was held on December 7, 1981. A Proposal for Decision was then issued denying the Application, based on a determination that the Applicants had not met their burden of proof on the issue of adverse effect with regard to the return of

the water to the source. (See January 23, 1982 Proposal for Decision, pp. 13-16.)

The Applicants in this matter filed exceptions to the Proposal for Decision. The Hearing Examiner overruled the exceptions in the July 19, 1982 Final Order, but determined that the permit could be granted subject to the Department's authority to require modifications and to so condition the permit. (See Final Order, pp. 2-3.) Therefore, the Permit in this matter was granted, allowing the Applicants to appropriate 600 gallons per minute ("gpm") up to 33 acre-feet of water per year from Confederate Creek for placer mining, provided that the Applicants piped the waters to and from the operation and did not discharge the waters on any land surface "insofar as practicable". (See Final Order, pp. 4-6.)

The Hearing Examiner specifically took into account the water quality effects of piping water directly back into Confederate Creek (see Final Order, pp. 2-3), and found that piping the return flow directly back into the stream did not appear to involve any "overwhelming water quality problems". (Final Order, p. 3.) However, the Department of Health and Environmental Science subsequently disallowed direct return flows to the creek. Therefore, the Permittees did not install a piping system such as was required by the water use permit issued by the Department of Natural Resources and Conservation. (Testimony of Robert Loomis.)

2. Employees from DNRC field-verified the permit on August 18, 1986. They found the water use to be in substantial accordance with the Permit, except that Permit Condition C (requiring piping) had not been met. The proposed recommendation, based on the field verification, was to revoke the Permit. (See August 29, 1986 letter to Robert Loomis from Jim Beck.) Following discussions with Permittee Loomis, Jim Beck recommended that the Permit be modified, based on the fact that Condition C of the permit had not been met. (See Verification Report by Jim Beck.)

Permittee Loomis requested a hearing on the proposed modification, stating that the percolating ponds in place were more suitable to ensure water quality, but adding that he could comply with the piping "if necessary". (See Permit Verification Form, signed by Robert Loomis on October 1, 1986.)

3. The Department held a modification hearing on November 10, 1987, proposing to modify the Permit by deleting Condition C and adding an alternative condition which required the Permittees to discharge the water from their operation into lined ponds, from which the water would be piped back into Confederate Creek. See October 7, 1987 Notice of Modification Hearing and Order to Show Cause. James Beck testified that he designed the modification alternative to meet the concerns of Department of Health and Environmental Science, while accomplishing the goal of Condition C in ensuring that there was no significant time lapse in return flow to the stream.

At the November 10, 1987 modification hearing, the Permittee withdrew his support for the Department's proposed modification. (Testimony of Jim Beck, Robert Loomis.) Mr. Loomis was concerned that settling ponds of the size proposed by Mr. Beck would overflow, and that it would not be possible to keep the plastic lining clean to prevent the ponds from silting in. (Testimony of Robert Loomis.)

Subsequent to the November 10, 1987 hearing, the Department moved to dismiss the modification action on the grounds that the Permittee's withdrawal of support for the Department's proposed modification left the Department no alternative but to propose revocation for failure to comply with permit conditions, but that the hearing notice had failed to propose revocation in the alternative (lack of adequate notice). See January 25, 1988 Motion to Dismiss Department Action.

This Motion was granted, and the modification proceedings were deemed void, so that Beneficial Water Use Permit No. 28224-s41I remained in effect pursuant to the terms under which it was issued. (See January 26, 1988 Order.)

4. Subsequent to dismissal of the modification action, Jim Beck contacted Mr. Loomis to notify him that revocation of the permit would be recommended, and to allow Mr. Loomis a chance to respond to suggest an alternative. (See April 6, 1988 letter from Jim Beck to Robert Loomis.) Mr. Loomis requested a hearing on the proposed revocation. Therefore, a revocation hearing was

scheduled in this matter, and held on November 29, 1988. The record in this matter closed on January 31, 1989.

5. Section 85-2-314, MCA, states:

If the work on an appropriation is not commenced, prosecuted, or completed within the time stated in the permit or an extension thereof or if the water is not being applied to the beneficial use contemplated in the permit or if the permit is otherwise not being followed, the department may, after notice, require the permittee to show cause why the permit should not be modified or revoked. If the permittee fails to show sufficient cause, the department may modify or revoke the permit.

6. Beneficial Water Use Permit No. 28224-s41I was issued subject to five permit conditions. Condition C states, "The Permittees shall pipe waters to and from their gravel washing plant, and shall not discharge any such waters on any land surface insofar as practicable."

7. Field verification of the Permit found that Permit Condition C was not being met. Permittee Robert Loomis does not dispute the fact that water from his placer mining operation is not returned to the source by pipe, as required, but rather is allowed to return by means of percolation through the bottom of a series of "percolating" (settling) ponds. Mr. Loomis believes, however, that the delay caused by the water going through the ponds rather than being piped back to the creek is not of long duration, due to the proximity of the ponds to the creek. (The ponds are located approximately 50 vertical feet and 100 lateral feet from Confederate Creek.)

Mr. Loomis testified that there is a delay in return flow when the operation is first started up, but that there is no apparent fluctuation in flow afterward except for changes he attributes to barometric pressure. When the ponds are kept clean, water percolates out of them "overnight". The water is used daily during the day for mining operations, except for one or two days per month. (Testimony of Robert Loomis.)

Mr. Loomis has not done any testing, and cannot say at what points water from the ponds rejoins Confederate Creek, but he feels that it rejoins the creek above the "flat" where other appropriators divert water for irrigation.

8. Mr. Loomis bases his statements concerning return flow on his experience using Boulder Creek water for his mining operation, pursuant to a separate permit. He testified that he obtained the Confederate Creek permit which is the subject of the present matter as "insurance"; that is, to ensure water would be available for his project at those times when Boulder Creek water was not available. Mr. Loomis stated that his Boulder Creek water supply occasionally fails, and that he needs a definite source of supply for his mining operation.

Mr. Loomis set up pipelines and a pump so that he could use water pursuant to the Confederate Creek permit, but did not use water from this source for production at his operation, due to Department of Health regulations. He later removed his pump. (Testimony of Robert Loomis; August 27, 1986 Field Verification Report.)

9. Mr. Loomis requests that the permit not be revoked, but instead be modified to allow him to use the percolation ponds that are in place. He testified, and the Department admits, that compliance with the present permit condition requiring piping the water back to the source violates Department of Health and Environmental Science regulations. Mr. Loomis does not agree with the original Finding of Fact (January 23, 1982 Proposal for Decision) that the present pond system will cause adverse effect to other water users by causing an unquantified lag in return of the water to the source.

Based upon the foregoing Findings of Fact and upon the record in this matter, the Hearing Examiner makes the following:

PROPOSED CONCLUSIONS OF LAW

1. The Department has jurisdiction over the subject matter herein, and the parties hereto.

2. The Department gave proper notice of the hearing, and all substantive and procedural requirements of law or rule have been fulfilled, therefore the matter was properly before the Hearing Examiner.

3. Permittee Robert Loomis has not followed the conditions imposed upon the Permit in this matter, and the Permit therefore is subject to revocation. See Finding of Fact 6.

It is quite clear from the record in this matter that Permit No. 28224-s41I would not have been granted without the specific conditions attached to it, and that evidence that the conditions

could not be met would have resulted in its denial. The Proposal for Decision sets forth the potential adverse effects of the Applicants' proposed plan of operation utilizing settling ponds -- the operation method which Permittee Loomis in fact is using -- and states that the Applicants failed to meet their burden of proof that this means of operation would not adversely affect prior appropriators. See January 23, 1982 Proposal for Decision, pp. 13-16. The Hearing Examiner granted the Permit at Final Order stage only because conditions could be imposed which would alleviate the adverse effect. See July 19, 1982 Final Order, § 85-2-312(1), MCA (1981).

Since the Permit was granted subject to conditions specifically designed to ensure that the criteria for permit issuance could be met, and since the conditions have not been followed, it is necessary to revoke the Permit to protect the rights of prior appropriators.

4. Permittee Robert Loomis has failed to show sufficient cause why the Permit in this matter should not be revoked.

Mr. Loomis argues that he cannot meet the permit conditions and remain in compliance with Department of Health requirements. This appears to be true. However, DNRC cannot waive its obligation to make sure that statutory criteria are met and permits are followed because there is a conflict with the regulations of another state agency. Mining operations such as the Permittee's may require permits from several agencies, each one of which must be fulfilled or the project will fail.

If the conflict could have been foreseen - that is, if the information available to the Hearing Examiner had indicated that the direct return condition would not be acceptable to DHES and the Permittee would not be allowed to so operate -- the water use permit most likely would not have been granted, since the record does not contain information which would allow an alternate solution to be devised. As it is, neither the Hearing Examiner's determination on this issue nor his conditioning of the permit to change the proposed return flow system were appealed to court by the Permittees, nor did the Permittees ever contact the Department when they discovered that the permit condition would conflict with other state regulations.

5. Mr. Loomis proffers the "solution" of removing the permit condition entirely, based upon his stated belief that his settling pond system does not result in much delay in return flow to Scoffin Creek. However, this system was reviewed at the initial hearing in this matter and specifically found not to meet statutory requirements with regard to adverse effect to prior appropriators. The Department cannot "second guess" the original fact-finder at this stage. Furthermore, the Permittee has not presented any more information than was presented at the original hearing and certainly not enough to overcome the Hearing Examiner's Findings on the issue of adverse effect, even if the Department procedurally was able to remove permit conditions without holding a hearing attended by the Objectors to the original application.

6. The Permit in this matter must be revoked for failure to comply with permit conditions, unless the Permittee provides substantial credible evidence as to how the Permit may be exercised without complying with Permit Condition C and not cause adverse effect to prior appropriators.

The record in this matter indicates that Permit Condition C is necessary to protect prior appropriators from adverse effect. The Permittee has not proved otherwise, nor has he agreed to the only alternative permit conditions which the Department has been able to devise to alleviate adverse effect. (See Findings of Fact 2 and 4.) However, the Department does recognize that the Permittee is at an impasse caused by conflicting requirements of another state agency. (Finding of Fact 10.) Therefore, the Hearing Examiner is willing to extend one last chance to the Permittee prior to the Permit being revoked, by allowing the Permittee an opportunity to request a hearing at which he may propose alternative permit conditions or present evidence that his present system does not cause adverse effect to the water rights of other appropriators.

In order to obtain another hearing, however, the Permittee must be prepared to present evidence which was not available at the time of the original (1981) hearing. He may not submit the same testimony and evidence in the hope that it will lead to a different result, since a rehearing of the same evidence is expressly prohibited by the Department's procedural rules. See Administrative Rule of Montana 36.12.231.

Furthermore, if the Permittee requests a hearing, the original objectors must be allowed to be present, since the issue is how the Permit in this matter can be exercised without causing adverse effect to the rights of prior appropriators. The Permittee would be required to present his own proposal for permit modification, and provide substantial credible evidence that the concerns set forth in the January 23, 1982 Proposal for Decision and any new issues raised by the Objectors in response to his proposed plan will not result in adverse effect to the prior appropriators.

WHEREFORE, based upon the foregoing Findings of Fact and Conclusions of Law, the Hearing Examiner makes the following:

ORDER

Beneficial Water Use Permit No. 28224-s41I, issued to Robert Loomis and Clark and Opal Edenfield, shall be revoked. PROVIDED, however, that this revocation will not be processed by the Department if Permittee Robert Loomis submits a written request for hearing within 30 days of the date of this Order, alleging that he has an alternative operation plan which will not cause adverse effect to the prior appropriators, and further alleging that new evidence is available and specifying what comprises this evidence.

If the Permittee does not request a hearing and provide the above-specified information, the Permit in this matter will be revoked.

If the Permittee requests a hearing, but the evidence presented at such hearing is insufficient to meet the Permittee's burden of proof on adverse effect, the Permit will be revoked.

If the Permittee requests a hearing and meets his burden of proof on the issue of adverse effect under an alternate plan of operation, the Permit shall remain in effect and shall retain its 1980 priority date.

Dated this 3rd day of March, 1989.

Peggy A. Elting
Peggy A. Elting, Hearing Examiner
Department of Natural Resources
and Conservation
1520 East 6th Avenue
Helena, Montana 59620-2301
(406) 444-6612

NOTICE

The Department's Final Order may be appealed in accordance with the Montana Administrative Procedure Act by filing a petition in the appropriate court within 30 days after service of the Final Order.


CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Order in the Alternative was duly served upon all parties of record at their address or addresses this 3rd day of March, 1989, as follows:

Robert Loomis
P.O. Box 264
Radersburg, MT 59644

James Madden
Legal Counsel
1520 East 6th Avenue
Helena, MT 59620

T.J. Reynolds
Helena Field Office
1520 East 6th Avenue
Helena, MT 59620


Irene V. LaBare
Legal Secretary

BEFORE THE DEPARTMENT
OF NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

* * * * *

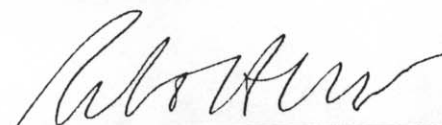
IN THE MATTER OF THE APPLICATION)
FOR BENEFICIAL WATER USE PERMIT) ORDER
NO. 28224-S41I BY ROBERT LOOMIS)
AND CLARK AND OPAL EDENFIELD)

* * * * *

Pursuant to Motion by the Department of Natural Resources and Conservation (the "department"), and for good cause shown, the show-cause action filed by the department on October 7, 1987 is hereby dismissed without prejudice, and all proceedings conducted pursuant to the show-cause action filed by the department are void.

Accordingly, Beneficial Water Use Permit No. 28224-s41I remains effective as issued.

DONE this 26 day of January, 1988.


Robert H. Scott, Hearing Examiner
Department of Natural Resources
and Conservation
1520 E. 6th Avenue
Helena, Montana 59620-2301
(406) 444 - 6625

CASE # 28224

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing ORDER was served by mail upon all parties of record at their address or addresses this 27th day of January, 1988, as follows:

Robert Loomis
Clark and Opal Edenfield
Box 21
Radersburg, MT 59641

Montana Power
Legal Staff
40 East Broadway
Butte, MT 59701

Toni Thiriot
2541 Dearborn
Salt Lake City, UT 84106

Donald Marks
Hidden Valley Ranch
Townsend, MT 59644

John and Janice Hunter
RR 1, Box 91
Townsend, MT 59644

Gordon Brandon
Townsend, MT 59644

Gough, Shanahan, Johnson
and Waterman
P O Box 1715
Helena, MT 59624

Douglas Christie
Townsend, MT 59644

Jerry and JoAnn Finn
Route 1, Box 88A
Townsend, MT 59644

Graveley LD Ranch
c/o Gary Graveley
RR
Townsend, MT 59644

T. J. Reynolds
Helena Field Office
(inter-departmental mail)

Louise Galt
316 Fuller Avenue

James Madden
Legal Counsel
DNRC
(hand delivered)

Susan Howard
Susan Howard
Hearings Reporter

CASE # 28224

BEFORE THE DEPARTMENT
OF NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

* * * * *

IN THE MATTER OF THE APPLICATION)	
FOR BENEFICIAL WATER USE PERMIT)	MOTION TO DISMISS
NO. 28224-S41I BY ROBERT LOOMIS)	DEPARTMENT ACTION
AND CLARK & OPAL EDENFIELD)	

* * * * *

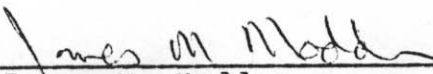
COMES NOW the Department of Natural Resources and Conservation (DNRC), by and through the undersigned attorney, and moves the Hearing Examiner to dismiss this action without prejudice.

The grounds for dismissal are as follows:

1. The DNRC brought this modification proceeding in lieu of revoking Permit No. 28224-s41I, so as to allow the Permittee to change his diversion works without adversely affecting the water rights of others.
2. At the hearing, the Permittee withdrew his support for the proposed modification, leaving the DNRC no alternative except to move for revocation of the Permit for failure to comply with the applicable conditions.
3. Because the Notice in this action did not state that revocation was the alternative to modification, the DNRC will withdraw its motion for revocation.
4. Because the Permittee withdrew his support for the proposed modification, the present action is moot.

WHEREFORE, the DNRC moves to dismiss this action. The DNRC reserves its right to bring a revocation action at a future date.

DATED this 25th day of January, 1988.


James M. Madden
Legal Counsel
Department of Natural Resources
and Conservation
1520 East Sixth Avenue
Helena, MT 59602-2301

CASE # 28224

CERTIFICATE OF SERVICE

I, the undersigned for the Department of Natural Resources and Conservation, hereby certify that on the 25th day of January, 1988, a true and accurate copy of the MOTION TO DISMISS DEPARTMENT ACTION was duly served upon the following parties or counsel of record, by depositing the same, postage prepaid, in the United States Mail.

Robert Loomis
Clark and Opal Edenfield
Box 21
Radersburg, MT 59641

Toni Thiriot
2541 Dearborn
Salt Lake City, UT 84106

John & Janice Hunter
RR 1, Box 91
Townsend, MT 59644

Gough, Shanahan, Johnson &
Waterman
P.O. Box 1715
Helena, MT 59624

Jerry & JoAnn Finn
Route 1, Box 88A
Townsend, MT 59644

T.J. Reynolds
Helena Field Office
(inter-departmental mail)

Montana Power
Legal Staff
40 E. Broadway
Butte, MT 59701

Donald Marks
Hidden Valley Ranch
Townsend, MT 59644

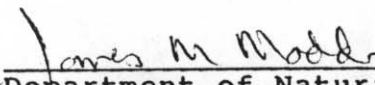
Gordon Brandon
Townsend, MT 59644

Douglas Christie
Townsend, MT 59644

Graveley LD Ranch
c/o Gary Graveley
RR
Townsend, MT 59644

Louise Galt
316 Fuller Avenue
Helena, MT 59601

Robert Scott
Hearing Examiner
1520 East Sixth Avenue
Helena, MT 59620
(hand-delivered)


Department of Natural Resources
and Conservation
1520 East Sixth Avenue
Helena, MT 59620-2301

CASE # 28224

BEFORE THE DEPARTMENT
OF NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

* * * * *

IN THE MATTER OF THE APPLICATION) NOTICE OF MODIFICATION HEARING
FOR BENEFICIAL WATER USE PERMIT) AND ORDER TO SHOW CAUSE AND
NO. 28224-S411 BY ROBERT LOOMIS) APPOINTMENT OF HEARING EXAMINER
AND CLARK & OPAL EDENFIELD)

* * * * *

To Applicants and Objectors:

The Department of Natural Resources and Conservation, pursuant to its authority under the Water Use Act, Title 85, Chapter 2, MCA, and specifically Section 85-2-402(8), MCA, and the Administrative Procedures Act, Title 2, Chapter 4, Part 6, MCA, hereby orders and gives notice that a show cause hearing in the above-entitled matter will be held on November 10, 1987, beginning at 10:00 a.m. in the Main Conference Room of the Department of Natural Resources and Conservation, 1520 East Sixth Avenue, Helena, Montana. All parties will be required to show cause why the above Permit should not be modified as provided below.

On July 19, 1982, a Final Order was issued by the Department of Natural Resources and Conservation granting Permit No. 28224-s411 to appropriate 600 gallons per minute up to 33 acre-feet per year of the waters of Confederate Gulch for placer mining purposes. This permit is subject to express limitations, restrictions, and conditions. The primary reason the permit was granted was Permit Condition "C" which reads:

The Permittees shall pipe waters to and from their gravel washing plant, and shall not discharge any such waters on any land surface insofar as practicable.

CASE # 28224

Condition "C" of the Final Order has not been met. During a verification by the Department, it was found that there was no piping from the discharge of the washing plant back to Confederate Gulch. According to Mr. Loomis, a pipe return system was not used because it would be in violation of the State Department of Health regulations. Although the water has been put to beneficial use, the conditions of this Permit were not followed.

Section 85-2-314, MCA, provides:

Revocation or modification of permits. If the work on an appropriation is not commenced, prosecuted, or completed within the time stated in the permit or an extension thereof or if the water is not being applied to the beneficial use contemplated in the permit or if the permit is otherwise not being followed, the department may, after notice, require the permittee to show cause why the permit should not be modified or revoked. If the permittee fails to show sufficient cause, the department may modify or revoke the permit.

(Emphasis added.)

The Department proposes to modify Water Use Permit No. 28224-s41I, as follows:

The following condition (from the Final Order) is to be deleted:

C. The Permittees shall pipe waters to and from their gravel washing plant and shall not discharge any such waters on any land surface insofar as practicable.

The following condition shall be added to the Permit:

C. The Permittees shall pipe water to his gravel washing plant. The water discharged from the washing plant shall go into a lined settling pond(s) with a maximum volume of 1.8 acre-feet and a maximum surface area of 0.6 acres (26,136 square feet). The lining material shall be polyvinyl chloride (PVC) sheets or bentonite installed in compliance with Soil Conservation Service specifications and standards for lining

small dams. Any water spilled from the last settling pond shall be piped to Confederate Gulch at a point near the diversion.

The replacement condition will accomplish four goals:

1. The water will be conveyed in pipelines to and from the washing plant to minimize any water losses.
2. The settling pond(s) will be lined to virtually eliminate seepage loss from it.
3. The settling pond(s) will be limited in volume and surface area to limit the evaporation losses. The peak loss would be about eight gallons per minute.
4. The washing plant/settling pond system could be made to comply with Montana Department of Health and Environmental Sciences requirements.

At the hearing in this matter, all parties will be asked to show cause why Permit No. 28224-s41I should not be modified as indicated above. You may present factual evidence contrary to the Department's field verification and present any arguments as to why the Permit should not be modified. You may represent yourself or obtain legal counsel in this matter. The hearing procedures will be governed by MCA Title 2, Chapter 4, Part 6, and by ARM Title 36, Chapter 12, Part 2.

If you desire to waive formal proceedings under Section 2-4-603, MCA, then you should notify Robert Scott, the appointed Hearing Examiner, Department of Natural Resources and Conservation, 1520 East Sixth Avenue, Helena, Montana 59620, in writing, within 15 days from receipt of this order. If you do not contest the Department's proposed action or do not present sufficient evidence at the

CASE # 28224

hearing, the Department will modify Permit No. 28224-s41I as indicated above. If you fail to appear at the hearing, you will be in default, which could be deemed a failure to contest the proposed modification.

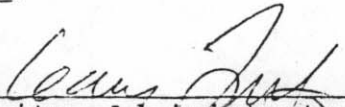
ORDER TO SHOW CAUSE

All parties are hereby ordered to show cause at a hearing to be held November 10, 1987, beginning at 10:00 a.m. in the Main Conference Room of the Department of Natural Resources and Conservation, 1520 East Sixth Avenue, Helena, Montana, why Permit No. 28224-s41I should not be modified as provided in the NOTICE.

APPOINTMENT OF HEARING EXAMINER

Robert Scott is hereby appointed Hearing Examiner in the above action. Section 2-4-611, MCA, provides for disqualification of Hearing Examiner.

DONE this 7 day of October, 1987.



Gary Fritz, Administrator
Water Resources Division
Department of Natural Resources
and Conservation
1520 E. 6th Avenue
Helena, Montana 59620-2301
(406) 444 - 6605

CASE # 28224

AFFIDAVIT OF SERVICE
MAILING

STATE OF MONTANA)
) ss.
COUNTY OF LEWIS & CLARK)

Susan Howard, an employee of the Montana Department of Natural Resources and Conservation, being duly sworn on oath, deposes and says that on October 9, 1987, she deposited in the United States mail, certified postage prepaid, a NOTICE OF MODIFICATION HEARING AND ORDER TO SHOW CAUSE AND APPOINTMENT OF HEARING EXAMINER by the Department on the Application for Beneficial Water Use Permit No. 28224-s411, by Robert Loomis and Clark & Opal Edenfield, addressed to each of the following persons or agencies:

Robert Loomis
Clark and Opal Edenfield
Box 21
Radersburg, MT 59641

Montana Power
Legal Staff
40 East Broadway
Butte, MT 59701

Toni Thiriot
2541 Dearborn
Salt Lake City, UT 84106

Donald Marks
Hidden Valley Ranch
Townsend, MT 59644

John and Janice Hunter
RR 1, Box 91
Townsend, MT 59644

Gordon Brandon
Townsend, MT 59644

Douglas Christie
Townsend, MT 59644

Gough, Shanahan, Johnson &
Waterman
P. O. Box 1715
Helena, MT 59624

CASE # 28224

Graveley LD Ranch
c/o Gary Graveley
RR
Townsend, MT 59644

Jerry and JoAnn Finn
Route 1, Box 88A
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T. J. Reynolds
Helena Field Office
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Robert Scott
Hearing Examiner
1520 East Sixth Avenue
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(hand delivered)

James Madden
Legal Counsel
1520 East Sixth Avenue
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(hand delivered)

DEPARTMENT OF NATURAL RESOURCES AND
CONSERVATION

by Susan Howard

STATE OF MONTANA)
) ss.
COUNTY OF LEWIS & CLARK)

On this 9th day of October, 1987, before me, a Notary Public in and for said state, personally appeared Susan Howard, known to me to be the Hearings Recorder of the Department that executed this instrument or the persons who executed the instrument on behalf of said Department, and acknowledged to me that such Department executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, the day and year in this certificate first above written.

Gregory S. Sanborn
Notary Public for the State of Montana
Residing at Helena, Montana
My Commission Expires October 17, 1992

CASE # 28224

File

BEFORE THE DEPARTMENT
OF NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

* * * * *

IN THE MATTER OF THE APPLICATION)	
FOR BENEFICIAL WATER USE PERMIT)	FINAL ORDER
NO. 28224-s41I BY ROBERT LOOMIS AND)	
CLARK & OPAL EDENFIELD)	

* * * * *

Objection has been submitted to the Proposal for Decision in this matter on behalf of Robert Loomis by and through his attorney Leo Kottas.

The Applicant contends that the Proposal for Decision inappropriately denied the permit requested in this matter based on a conjectural forecast of the disruptions in stream flow in Confederate Creek that will occur as a result of Applicant's intended use. We agree that Applicant's burden of proof, see MCA 85-2-311(7) (1981), does not encompass conjectural or speculative matters. However, it is not speculative to note the effects of gravity on water movement. The water leaving the Applicant's settling ponds must inevitably follow the hydraulic gradient. This gradient is most unlikely to be directly back to the stream, as the stream itself flows downhill, and as inevitably the waters adjacent thereto will follow that general gradient. We are willing to assume for present purposes that the water accruing to the ground water resource from Applicant's settling ponds will in fact reappear as surface flow of Confederate Creek at or before any of the Objector's points of diversion in this matter.

However, by the very nature of Applicant's proposed use, there will inevitably be disruptions in flow of Confederate Creek waters. Moreover, in light of the size of this source of supply, the Applicant's requested rate of withdrawal is a significant quantity of water during most times of the year and during most of the time during which he seeks to use the water.

One can also note Applicant's arguments to the effect that the federal government encourages and fosters the use of its lands for mineral production. However, Congress has not reserved waters for this Applicant's use for the purposes of mining. United States v. New Mexico, 438 U.S. 6967 (1978). The State of Montana also encourages the irrigation of its arid lands, though it will not do to foster this end to disrupt existing uses of the water resource for agricultural purposes.

Notwithstanding the foregoing, however, the Department feels that in the present circumstances it should exercise its authority to "require modification of plans and specifications for the appropriation or related diversion and construction." MCA 85-2-312(1) (1981). The portion of Applicant's proposed diversion that threatens adverse effect to the rights of prior appropriators is his proposed system of collecting return flows from his placer mining operation and placing them in settling ponds. If Applicant were required to pipe said water directly back into the source of supply, the attendant difficulties and the disruption of Confederate Creek flows would be alleviated.

Moreover, by the nature of Applicant's use, it is not likely that return flows will offer much more than colloidal clays and

silts. The Department can officially note that Confederate Gulch is a heavily used stream for agricultural purposes, and offers little in the way of a productive fishery or as a source of supply for domestic uses. These fine clays and silts, if anything, will tend to seal Confederate Creek and diversion ditches, and thus extend the available water supply. See A.B. Cattle Company v. United States, (Colo.), 589 P.2d 57 (1979). Moreover, Applicant's use is high in the headwaters of this particular stream, and any turbidity effects will be dissipated and diluted by accruing waters. Further, nothing in the water quality acts of the State of Montana or the Department of Health and Environmental Sciences regulations would appear to prohibit the probable effects of Applicant's use per se. Confederate Gulch is a "B-1 stream", see ARM 16. 20. 607 (1), and while such streams are subject to turbidity requirements, see ARM 16. 20. 618 (2) (d), such turbidity levels must be also geared toward the present and contemplated uses of the receiving water and the quality and nature of the flow therein. See ARM 16. 20. 631, ARM 16. 20. 634, MCA 75-5-301 (1981). Thus, piping the return flow directly back to the stream does not appear to involve any overwhelming water quality problems.

The Proposal for Decision, except as modified herein, is expressly incorporated herein.

WHEREFORE, based on these Findings of Fact and Conclusions of Law, the following Final Order is hereby issued.

Subject to the terms, restrictions and limitations described below, Application for beneficial Water Use Permit No. 28224-s41I is hereby granted to Robert H. Loomis and Clark H. and Opal Edenfield to appropriate 600 gallons per minute up to 33 acre-feet per year of the waters of Confederate Gulch for placer mining purposes. Said water shall not be diverted prior to April 15, of any given year nor subsequent to November 15 of any given year. Said waters may be diverted from the south side of Confederate Gulch as it traverses from east to west across the northerly or northeasterly boundaries of Government Lots 1, 8, 7, and 6 in Section 30, Township 10 North, Range 3 East, and/or from the south side of Confederate Gulch where it traverses from east to west across portions of Government Lots 10, 9, 8, and 6 in Section 25, Township 10 North, Range 2 East, and/or from the southeast side of Confederate Gulch as it traverses in a southwesterly direction across the northwesterly boundaries of Government Lots 4 and 9, Section 26, Township 10 North, Range 2 East. Said waters may be used on unpatented mining claims of Lucky Lady No. 1 in Government Lot 9, and Lucky Lady No. 2 in Government Lot 4 in Section 26, Township 10 North, Range 2 East, and Lucky Lady No. 3 in Government Lot 6 and Lucky Lady No. 4 in Government Lot 8, and Lucky Lady No. 5 in Government Lot 9, and Lucky Lady No. 6 in Government Lot 10, all in Section 25, Township 10 North, Range 2 East; and in Government Lots Nos. 6, 7, 8 and 1 in Section 30, Township 10 North, Range 3 East, all in Broadwater County. The priority date for this permit shall be April 25, 1980, at 2:29 p.m.

CASE # 28224

This permit is subject to the following express limitations, restrictions and conditions.

A. Any rights evidenced herein are subject to all prior and existing rights, and to any final determination of such rights as provided by Montana Law. Nothing herein shall be construed to authorize the Permittees to use or withdraw waters to the detriment of any senior appropriator.

B. The Permit shall be subject to the authority and jurisdiction of any water commissioner appointed to distribute the waters of the source of supply. The Permittees shall further pay any expenses attendant thereto as required by law.

C. The Permittees shall pipe waters to and from their gravel washing plant, and shall not discharge any such waters on any land surface insofar as practicable.

D. Nothing herein shall be construed to affect or reduce the Permittee's liability for damages which may be caused by the exercise of this permit. Nor does the Department in issuing this permit acknowledge any liability for damages caused by the exercise of this permit, even if such damage is the necessary and unavoidable consequence of the same.

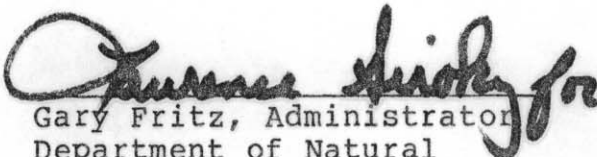
E. The Permittee shall in no event cause to be diverted from the source of supply pursuant to this permit more water than is reasonably required for the purposes provided for herein. At all times when water is not reasonably required for these purposes,

the Permittee shall cause and otherwise allow the waters to remain in the source of supply Confederate Gulch.

NOTICE

The Department's Final Order may be appealed in accordance with the Montana Administrative Procedures Act by filing a petition in the appropriate court within thirty (30) days after service of the Final Order.

DONE this 19th day of July, 1982.



Gary Fritz, Administrator
Department of Natural
Resources and Conservation
32 S. Ewing, Helena, MT
(406) 449 - 2872



Matt Williams, Hearing Examiner
Department of Natural Resources
and Conservation
32 S. Ewing, Helena, MT 59620
(406) 449 - 3962

AFFIDAVIT OF SERVICE

STATE OF MONTANA)
) ss.
County of Lewis and Clark)

Beverly J. Jones, an employee of the Montana Department of Natural Resources and Conservation, being duly sworn on oath, deposes and says: That pursuant to the requirements of Section 85-2-309, MCA, on August 2, 1982, he deposited in the United States mail, "certified mail", an Order by the Department on the application by Loomis & Edenfield, Application No. 28224-s411, for a Permit to Appropriate Water, addressed to each of the following persons or agencies:

1. Robert Loomis and Opal Edenfield, Box 21 Radersburg, MT 59641
2. Montana Power Company, 40 East Broadway, Butte, MT 59701
3. Ron Waterman, Attorney, Box 1715, Helena, MT 59624
4. Toni Thiriot, 2541 Dearborn, Salt Lake City, Utah, 84106
5. Donald Marks, Hidden Valley Ranch, Townsend, MT 59644
6. John & Janice Hunter, RRI, Box 91, Townsend, MT 59644
- Gordon Brandon, Townsend, MT 59644
6. Douglas Christie, Townsend, MT 59644
7. T. J. Reynolds, Helena Area Office Supervisor (inter-department mail)
8. Matt Williams, Hearing Examiner, (hand deliver)

DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION

STATE OF MONTANA)

by Beverly J. Jones

) ss.

County of Lewis & Clark)

On this 2nd day of August, 1982, before me, a Notary Public in and for said State, personally appeared Beverly J. Jones, known to me to be the Hearing Recorder, of the Department that executed this instrument or the persons who executed the instrument on behalf of said Department, and acknowledged to me that such Department executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, the day and year in this certificate first above written.

Judy Lohr
Notary Public for the State of Montana

Residing at Montana City, Montana

My Commission Expires 3/1/85

BEFORE THE DEPARTMENT
OF NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

* * * * *

IN THE MATTER OF THE APPLICATION)	
FOR BENEFICIAL WATER USE PERMIT)	PROPOSAL FOR DECISION
NO. 28224-S41I BY ROBERT H. LOOMIS)	
AND CLARK H. AND OPAL EDENFIELD)	

* * * * *

Pursuant to the Montana Water Use Act and to the contested case provisions of the Montana Administrative Procedures Act, a hearing in the above-entitled matter was held in Helena, Montana.

PRELIMINARY MATTERS

The Application at issue herein seeks 900 gallons per minute up to 49.5 acre-feet for placer mining purposes from April 15 to November 15, inclusive, of each year. The Applicant claims three (3) alternate points of diversion to be located in Section 25, Section 26, and Section 30, Township 10 North, Range 3 East. The place of use is alleged to be comprised of the following placer mining locations: Lady Luck Claim No. 1 in Government Lot 9; Lucky Lady Claim No. 5 in Government Lot 9; and Lady Luck Claim No. 6 in Government Lot 10, all in Section 25, Township 10 North, Range 2 East; and Lady Luck Claim 2 in Government Lot 4, Section 26, Township 10 North, Range 2 East; and Lady Luck Claim No. 3 in

Government Lot 6; and Lady Luck Claim No. 4 in Government Lot 8, all located in Section 30, Township 10 North, Range 3 East. The source of supply is claimed to be Confederate Gulch, a tributary of the Missouri River. The pertinent portions of this application were published for three (3) successive weeks in the Townsend Star, a newspaper of general circulation, printed and published in Townsend, Montana, and The Independant Record, a newspaper of general circulation, printed and published in Helena, Montana. Mr. Robert Loomis appeared personally at the hearing in this matter.

On September 16, 1980, an objection to the granting of this application was filed with the Department of Natural Resources and Conservation by John H. and Janice M. Hunter. Neither of these persons appeared personally at the hearing, nor were they otherwise represented in this action.

On September 15, 1980, an objection to the granting of the above-stated applciation was filed with the Department of Natural Resources by Donald C. and Joanne M. Marks. Mr. Marks appeared personally at the hearing in this matter.

On September 11, 1980, an objection to the granting of this application was filed with the Department by Toni Thiriot. This person did not appear at the hering in this matter.

On August 29, 1980, an objection to the granting of the above-stated application was filed with the Department on behalf of the Montana Power Company. This objector appeared at the hearing in this matter by Larry Gruel, and was represented by counsel K. Paul Stahl of Gough, Shanahan, Johnson & Waterman.

Mr. Gordon Brandon also objected to the granting of the above-stated application on July 28, 1980, and appeared personally at the hearing in this matter.

EXHIBITS

The Applicant offered into the record a single exhibit,
to-wit:

A-1: A U.S.G.S. map depicting the location of Applicant's placer mining claims.

The Applicant's exhibit was duly received into the record.

The Department offered into the record three (3) exhibit,
to-wit:

D-1: A four-page report by a Department employee projecting the anticipated evaporation loss to be expected from Applicant's proposed use.

D-2: Photographs taken of Applicant's proposed means of diversion.

D-3: Photographs of Applicant's place of use.

D-4: Photographs of Applicants' processing machinery and place of use.

D-5: A photograph of Applicants' proposed place of use.

All of the Department's exhibits were duly received into the record without objection.

The Hearings Examiner, after considering the evidence herein, and now being fully advised in the premises, does hereby make the following findings of fact, conclusions of law, and proposed order.

FINDINGS OF FACT

1. The Department has jurisdiction over the subject matter herein, and over the parties hereto, whether they have appeared or not.

2. The Applicants are with bona fide intent to appropriate 600 gallons per minute up to 33 acre-feet per year, but any intent to withdraw or use greater quantities are at this time speculative.

3. Applicants' proposed water use would be of material benefit to themselves in their placer mining operation. The Applicants intend to use the waters diverted to wash the aggregate removed in their gold mining operation.

4. The use of 600 gallons per minute up to 33 acre-feet per year is a reasonable estimate of the quantity of water required for Applicants purposes, and the use of such quantity will not result in the waste of the water resource.

5. The source of supply of the waters claimed herein will be Confederate Gulch, a tributary of the Missouri River.

6. There are no permits or water reservations which the proposed water use will affect.

7. The Applicants intend to use the waters claimed herein on six (6) placer mining locations in Section 26 and 25, Township 10 North, Range 2 East, and in Section 30, Township 10 North, Range 3 East, all in Broadwater County. The Applicants intend to divert the waters claimed herein by means of a portable pump, from which the water will be conveyed to the place of use by aluminum pipe. Return flows from Applicants' use will be collected in a system of settling ponds.

8. Only two (2) of Applicants' ponds are commonly used in its gold mining operations. The first settling pond has a capacity of approximately one (1) acre-foot, and the second settling pond has a capacity of approximately .8 acre-foot. Said settling ponds, when scraped to bedrock, exhibit high permeability, with the waters placed herein commonly being discharged within a sixteen (16) hour period.

9. The Applicants presently use 300 to 400 gallons per minute for placer mining purposes from certain tail waters derived from Boulder Creek, which is a tributary of Confederate Gulch.

10. The waters diverted for Applicants' proposed use will return to the hydraulic basin of Confederate Gulch, although the precise point of return is on this record speculative. The time

between Applicants' diversion and the ultimate return of these waters to Confederate Gulch is also conjectural.

11. The Applicants' proposed means of diversion are customary for their intended purposes, and will not result in the waste of the water resource. Such methods of diversion are therefore adequate.

12. There are unappropriated waters available for Applicants' proposed use in the source of supply. Applicants' proposed use for all practical purposes will be nonconsumptive, and no water of practical significance will be ultimately lost to this source of supply.

13. Applicants' proposed use will adversely affect prior appropriators. The delays engendered by the hiatus between Applicants' diversions and the ultimate return of these waters to Confederate Creek will deprive other water users of their historic water usage at their historic time and place of need.

14. The Objector Marks uses water for irrigation and stock watering purposes and is a successor in interest to a decreed right in the source of supply.

15. The Objector Brandon also utilizes waters of Confederate Gulch and is a successor in interest to decreed rights out of Confederate Gulch.

16. The Applicants herein claim the right to use the water from April 15 to November 15, inclusive, of each year. Both objectors herein use the waters of Confederate Gulch substantially during these same time frames.

CONCLUSIONS OF LAW

1. The Department of Natural Resources and Conservation must issue a new water use permit if the following conditions or criteria exist.

(1) there are unappropriated waters in the source of supply:

(a) at times when the water can be put to the use proposed by the applicant;

(b) in the amount the applicant seeks to appropriate; and

(c) throughout the period during which the applicant seeks to appropriate, the amount requested is available;

(2) the rights of a prior appropriator will not be adversely affected; (3) the proposed means of diversion, construction, and operation of the appropriation works are adequate;

(4) the proposed use of water is a beneficial use;

(5) the proposed use will not interfere unreasonably with other planned uses or developments for which a permit has been issued or for which water has been reserved;

(6) an applicant for an appropriation of 10,000 acre-feet a year or more and 15 cubic feet per second or more proves by clear and convincing evidence that the rights of a prior appropriator will not be adversely affected;

(7) except as provided in subsection (6), the applicant proves by substantial credible evidence the criteria listed in subsections (1) through (5).

The foregoing provision reflects changes made by the 1981 legislature. These changes were expressly made applicable to pending proceedings. No prejudice accrues to the Applicants in this matter, because a close inspection of these changes reflects that the new language merely makes explicit what was formerly implicit.

2. Pursuant to this section, the Department has jurisdiction over the subject matter herein, and by the appearance of the parties hereto, has jurisdiction over the persons involved herein.

3. The Applicants have a bona fide intent to appropriate only 600 gallons per minute up to 33 acre-feet per year. While the Application sought 900 gallons per minute up to 49.5 acre-feet per year, the testimony of the Applicant herein reflects that the additional quantity requested was premised on a hope or belief of increased production at some future point. This is not in accord with the fixed and definite plan for the use of water that is the hallmark of an initiation of an appropriation. See Toohy v. Campbell, 24 Mont. 13, 60 P. 396 (1900). The volumetric amount reflected in the Application in this matter has therefore been reduced proportionately to track with Applicants' present intentions as to the flow rate required for his purposes.

4. The use of 600 gallons per minute up to 33 acre-feet per year would be of material benefit to the Applicant, as the use of water is integral to the placer mining operation Applicants are engaged in. Such a use of water is mining within the legislative definition of "beneficial use". See MCA 85-2-102(2) (1981).

5. The Applicants herein are not seeking a volumetric quantity in excess of 10,000 acre-feet a year or more, nor more than a flow measure of 15 cubic feet per second or more, and therefore must prove the statutory conditions by substantial credible evidence.

6. The use of 600 gallons per minute up to 33 acre-feet per year is a reasonable estimate of the quantity of water required for Applicants' purposes. Applicants' proposed use of the quantity of water they seek is therefore a beneficial one. See generally Sayre v. Johnson, 33 Mont. 15, 81 P. 389 (1905), Worden v. Alexander, 108 Mont. 208, 90 P.2d 160 (1939).

The record herein reflects some measure of controversy as to the Applicants' need as to the amounts of water they are claiming herein. Necessity for the use of water is the talisman of the appropriative claim. See Tucker v. Missoula Light and Ry. Co., 77 Mont. 91, 250 P. 11 (1926); Cook v. Hudson, 110 Mont. 263, 103 P.2d 137 (1940); Quigley v. McIntosh, 88 Mont. 103, 290 P. 266 (1930). The Applicants herein claim an existing right to the use of water derived from the tail waters of waters ultimately derived from Boulder Creek, which is a tributary of Confederate Gulch. However, it is not necessary to decide when and in what situations supplemental water will be required to augment those waters claimed pursuant to the existing right, because from the record herein, this existing right seems to have a rather precarious character.

The Applicants herein with reference to their claim for an existing right make no allegations that they are successors in interest to any water user in or about the area. Moreover, they apparently claim that such water use was initiated no earlier than 1965. The decrees relating to Confederate Gulch, which by the terms thereof expressly included Boulder Creek, were entered at far earlier times. There is therefore no issue in view of the nature of Applicants' claims as to the validity of the decree as against a then existing water use. See generally State ex rel. Reeder v. District Court, 100 Mont 376, 47 P.2d 653 (1935).

In 1921, the Legislature in this state enacted provisions detailing an exclusive method of appropriating water on previously adjudicated streams. See 89-829 et seq., R.C.M. (1947). By the terms thereof, persons seeking post-adjudication appropriations must obtain court approval of their planned water use. Failure to obtain such approval results as a matter of law in frustration of any attempt to secure a water right. Anaconda National Bank v. Johnson, 75 Mont. 401, 244 P. 141 (1926); Hanson v. Southside Users' Ass'n., 167 Mont. 210, 537 P.2d 325 (1975).

Since the Applicants herein do not purport to have obtained such judicial approval, and in light of the nature of their remaining allegations, it is doubtful whether these Applicants have any protectible interest in their water use

out of Boulder Creek. This conclusion is not undermined by Applicants' present use of tail waters from a potentially protected existing stock watering use. Return flows belong to the source of supply. Creek v. Bozeman Water Works Co., 15 Mont. 121, 38 P. 459 (1894). It is therefore apparent that Applicants' present needs for water may be tested without reference to any claimed existing use.

6. The Applicants' proposed water use will not interfere unreasonably with other planned uses for which a permit has been issued or for which water has been reserved.

7. The Applicants' proposed means of diversion, construction, and operation of their appropriative works are adequate. The Applicants' proposed means of conveying the water to their place of use are customary for their intended purposes, and will not result in the waste of the water resource.

8. There are unappropriated waters available for Applicants' proposed use in the amounts they seek to appropriate, and throughout the period during which they seek the right to use the water. The evidence herein establishes that Applicants' use will be essentially non-consumptive. The evaporative losses that will accrue to the waters that will be diverted will be miniscule. The deprivation to downstream water users of the quantity represented by this evaporative loss cannot be said to reach the proportions of "adverse affect."

This is so despite the evidence in the record to the effect that the flows of Confederate Gulch are for all practical purposes entirely appropriated. The loss that Applicants' proposed use threatens to the drainage basin involved herein simply will not engender any practical or significant affect to any water user. Impacts of such a marginal nature simply cannot be dealt with in the prior appropriation context to this degree of precision.

Nor can the insignificant loss threaten by the Applicants' proposed use be made significant by a sort of "opening of the floodgates" argument. That is, the evaporative loss of Applicants' proposed use does not become threatening to downstream water users merely because some future appropriator may use the water, such that in conjunction with Applicants' losses, the combined effect would create actual harm. This scenario can be appropriately accounted for as the next ensuing appropriator tests his claim for unappropriated water through the permitting procedure.

Thus, the mere fact that this particular Applicants' water deprivations must be tolerated does not in and of itself assure a continuing saga of future appropriators with the same or similar effects. At some point, the aggregate of such modest effects will assume significant proportions. However, this Applicant cannot be shouldered with future consumptive uses of the water resource in this relatively

small drainage basin. The water consumed by Applicants' use is simply of no significance to the water use of downstream land owners. Therefore, in terms of the volume claimed, the waters Applicant seeks herein must be regarded as unappropriated. Any other result in this small drainage basin would frustrate the statutory directive to this Department "to encourage the wise use of the state's water resources by making them available for appropriation consistent with this chapter and to provide for the wise utilization, development, and conservation of the waters of the state for the maximum benefit of its people with the least possible degradation of the natural aquatic ecosystems." MCA 85-2-101(3) (1981).

8. The Applicants have failed to show by substantial credible evidence that their proposed water use will not adversely affect prior appropriators. It is true that Applicants' proposed use is heretofore been considered as taking only unappropriated waters. This, however, does not end the analysis of adverse effect. Applicants herein admit that any significant or substantial deprivation of water within Confederate Gulch will cause adverse effect to other water users within the drainage system. The timing of Applicants' diversions with regard to the inevitably accruing return flows thus becomes significant.

The timing effect on this record can only be regarded as conjectural. While the Applicants' settling ponds appear to be highly permeable when they are scraped to bedrock, this does not of itself establish the period of time these waters require to ultimately recharge the Confederate Gulch flow. It is plain that Applicants' believe that the waters discharging from the settling ponds proceed directly to the stream, and as the distance involved is very minor, they presume that the time lag is truly insignificant. However, it is a well-known fact that the movement of ground waters to surface water sources inevitably follows what is known as a hydraulic gradient, and this gradient may run substantially parallel to the stream for significant distances. This, coupled with the fact that ground water movement is almost always measured in terms of feet per year or feet per day, lays a basis for a potentially marked disparity in water flows in Confederate Gulch between the time of diversion and the time of recharge.

The significance of this temporal lag lies within two parameters. In high flow seasons, the lagging return flows may deprive a relatively junior appropriator of his historic flood water right by leaving him out of priority as to the waters eventually accruing to the source of supply by Applicant returns. In low water seasons, the alterations in Confederate Creek flow created by this lagging effect may significantly handicap a downstream irrigator in regulating

his diversion works so that he may reasonably apply the full measure of his appropriation to his intended use.

The evidence herein attests to recent fluctuations in Confederate Creek flow. Although the Applicants have noticed such cyclical effects upstream from their point of diversion, it is inevitable as the necessary result of Applicants operation that they will at least contribute to the same difficulties. Nor can this Hearings Examiner assume that such fluctuations will result in no unreasonable impact to the downstream appropriators method of diversion. The burden of proof is on the Applicant. MCA 85-2-311(7) (1981). Thus, the Hearings Examiner cannot assume that the present objectors will be out of priority at such times as these fluctuations may cause significant problems in an appropriators method of diverting his appropriative limit.

It is evident that Applicants garner some significant water quality benefits from this particular method of returning their unused waters to the stream. That is, much of the suspended sediments accumulated by Applicants' use appear to be leached out by the percolation process. If this is in fact the effect of Applicants' settling ponds, it simply attests to a relatively slow percolation rate. The leaching effect of soils bears a close correlation with their permeability. Thus, the success of Applicants' treatment of the water in trapping suspended sediments depends on soils of relatively low permeability. This low

permeability inevitably in turn will enunciate the time lag at issue herein. Therefore, on the whole record, Applicants' proposed use cannot be said on this record to threaten no adverse affect to prior rights.

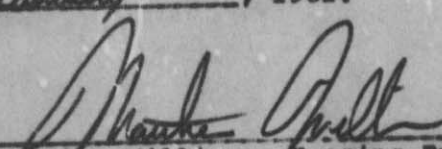
WHEREFORE, based on these findings of fact and conclusions of law, the follwoing proposed order is hereby issued.

Application for Beneficial Water Use Permit No. 28224-s41I is hereby ordered denied and dismissed in its entirety.

NOTICE

This Proposal for Decision is offered for the review and comment of all parties of record. Objections and exceptions must be filed with and received by the Department of Natural Resources and Conservation on or before February 12, 1982.

DONE this 23rd day of January, 1982.


Matthew Williams, Hearing Examiner
Department of Natural Resources
and Conservation
32 S. Ewing, Helena, MT 59620
(406) 449 - 3962